

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

) Amendment of Section 73.606(b),
) Table of Allotments,
) TV Broadcast Stations,
) (Appleton, New London and
) Suring, Wisconsin)MM Docket No. 92-299
RM-8049

To: The Chief, Allocations Branch

COMMENTS OF ARIES TELECOMMUNICATIONS CORPORATION

Aries Telecommunications Corporation ("Aries"), by its attorneys, hereby submits its Comments on the Commission's Notice of Proposed Rule Making in the captioned proceeding, 8 FCC Rcd 181 (M.M. Bur., released January 8, 1993) ("NPRM").^{1/} As set forth herein, both of the amendments to the TV Table of Allotments proposed in the NPRM are indisputably violative of numerous established Commission allotment policies, and the record herein contains no basis for waiving any of these policies to adopt either of the clearly impermissible amendments to the Table that the NPRM proposes.

1. By its NPRM, the Commission proposes the reallocation of television Channel 14 from Suring, Wisconsin to either Appleton,

^{1/} Aries is the licensee of television station WGBA(TV), Channel 26, Green Bay, Wisconsin. Aries has previously participated in this proceeding, having filed an Opposition on March 18, 1992 to a petition for reconsideration and reinstatement of the petition for rulemaking at issue herein.

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Wisconsin or New London, Wisconsin, and the concomitant modification of the license of WSCO(TV), Suring, Wisconsin to specify the change in community of license.^{2/} The NPRM was issued in response to a petition for rulemaking filed by Wisconsin Voice of Christian Youth, Inc. ("WVCY"), the licensee of WSCO(TV).

2. As Aries has noted previously, and as the Commission apparently concedes in its NPRM, the reallocation of Channel 14 would run afoul of both the Commission's established allotment priorities and the "freeze" the Commission has imposed on the TV Table of Allotments in metropolitan areas. First, it is beyond question that the reallocation of Channel 14 from Suring to either Appleton or New London would deprive Suring of its only local television transmission service, in flat contravention of the Commission's prohibition of such proposals. See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7096 (1990) ("Community of License MO&O").^{3/}

^{2/} The NPRM directs the proponent of these alternative amendments to specify precisely which proposal it will pursue. NPRM, para. 5.

Either reallocation proposal would also entail a change in channel offset for vacant television Channel 14 at Joliet, Illinois.

^{3/} The Commission emphasized in the Community of License MO&O that "the fact that a proposal would create a new local service (at the expense of an existing service) [i.e., the reallocation of Channel 14 from Suring to New London] is not sufficient, by itself, to warrant a waiver" of the

(continued...)

3. To make matters worse, the proposed reallocation of Channel 14 from Suring to Appleton would create a substantial "gray area" and leave yet another area with only two reception signals.^{4/} This result is patently contrary to yet another long-established allotment policy -- the Commission is "particularly hesitant to deprive an area of an existing first or second reception service." See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4874 (1989) ("Community of License R&O"). Thus, the alternative proposals presented in the NPRM are both prima facie inimical to the public interest and the objectives of Section 307(b) of the Communications Act, as expressed in the Commission's decisions regarding community reallocations.

4. Moreover, the NPRM's proposals are both violative of the Commission's "freeze" on amendments to the TV Table of Allotments within certain metropolitan areas. See Advanced Television Systems and Their Impact on the Existing Television

3/(...continued)

prohibition. 5 FCC Rcd at 7097. The reallocation of Channel 14 to Appleton is even more unjustifiable, as Appleton already has one authorized local transmission service. Indeed, the Commission reiterated in its instant NPRM that "[i]n general, we do not believe that the public interest is served by removing a community's sole local transmission service merely to provide a first or second local transmission service to another community." NPRM, para. 6.

4/ As the NPRM notes, WVCY has not shown the extent to which its New London proposal would bring about a loss in reception service. See NPRM, para. 3.

Service, 52 Fed. Reg. 28,346 (July 29, 1987) ("Freeze Order").

It is undisputed that the present site for Channel 14 at Suring, as well as the proposed Appleton and New London sites, are within the Milwaukee, Wisconsin "freeze area" and that the proposed amendments to the Suring, Appleton and New London allotments are therefore subject to the Freeze Order.

5. In the instant NPRM, the Commission not only acknowledges that the reallocations proposed therein violate its allotment priorities, but "tentatively conclude[s]" that the Freeze Order on its face operates to bar the proposals. NPRM, paras. 6-8. Indeed, the Commission originally dismissed WVCY's petition for rule making because it would not result in a preferential distribution of facilities. On reconsideration, however, the Commission has opted to solicit public comment on WVCY's proposals, based on language in the Community of License MO&O and the Freeze Order indicating that the Commission will consider waivers of the prohibition on allotment proposals taking away a community's only transmission service and the "freeze" on amendments to the TV Table of Allotments in metropolitan areas.

6. The only issue in this proceeding is therefore whether WVCY can justify a waiver of either of these prohibitions. WVCY faces a daunting task in attempting to do so. With respect to the prohibition on the removal of a community's sole local transmission service, the Commission has made clear that "a proposal which would reduce the number of communities enjoying local service is presumptively contrary to the public interest,"

and that the circumstances where such a proposal might serve the public interest are "rare." Community of License MO&O, 5 FCC Rcd at 7096-97.

7. The only example cited by the Commission of an instance in which a waiver of this prohibition might be warranted is where the proposal would "provid[e] a first reception service to a significantly sized population." Id. at 7096. Indeed, the Commission has consistently refused to adopt a reallocation proposal that would take away a community's only local service absent a showing of improvement in the provision of reception service. See Brunswick and Waycross, Georgia, 8 FCC Rcd 17 (M.M. Bur. 1992); Van Wert, Ohio and Monroeville, Indiana, 7 FCC Rcd 6519 (M.M. Bur. 1992). There is no evidence that either of the instant proposals involve such a benefit. Indeed, the Appleton proposal presents clear reception service detriments, by opening up a gray area and leaving another area with only two signals.

8. Moreover, the primary "benefit" claimed by WVCY in support of a waiver -- that adoption of either of the reallocations would "permit the continuing operation of WSCO" -- has no support in either Commission policy or the factual record. Nowhere in the Commission's community reallocation decisions is the financial hardship of an existing station cited as a possible basis for the waiver of the prohibition on removal of a community's only transmission service. Quite the contrary, the Commission has made clear that it "is not the guarantor of the financial success of its licensees." See PZ Entertainment

Partnership, L.P., 6 FCC Rcd 1240, 1243 (1991). Furthermore, the Commission refuses to consider economic impact arguments by its licensees in making its allotment decisions. See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), aff'd, 4 FCC Rcd 2276 (1989).

9. In addition, even if there were any precedent for waiving the Commission's allotment policies or the strictures of its reallocation policy on the basis of economic hardship, no such showing has been made here. None of the pleadings filed by WVCY over the course of this proceeding provides as much as a sworn declaration regarding WSCO(TV)'s alleged financial hardship, much less any objective supporting documentation. WVCY has not, therefore, even remotely approached meeting the heavy burden it carries to justify the removal of Suring's only local transmission service.

10. WVCY's burden is no less stringent with respect to a waiver of the television freeze. The television "freeze" was imposed to ensure the availability of sufficient spectrum for advanced television ("ATV") facilities in 30 major metropolitan areas, including Milwaukee, Wisconsin. The process of developing an ATV Table of Allotments is underway, but is not yet complete. See Second Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 5376 (1992). Indeed, the Commission has emphasized that the ATV Table of Allotments proposed in the Second Further Notice is a draft intended to aid interested

parties in focusing on the Commission's proposed ATV allotment policies, and that "the final ATV Table may change significantly" in light of the comments received. Id., para. 7. Thus, any change to the present TV Table of Allotments, particularly in the "freeze" areas where spectrum is most scarce, would change the ATV allotment scheme at a time when the public already has submitted comments thereon.

11. The proposals advanced in the instant NPRM entail not only a change in community of the existing Channel 14 allotment, but a move in WSCO(TV)'s transmitter site closer to Milwaukee and a massive increase in power. As such, these proposals would have a highly preclusive effect on the availability of ATV spectrum in the Milwaukee area. The reallocation of Channel 14 to a new community, together with a mammoth increase in power and a reference point closer to Milwaukee, would fundamentally undermine the ATV spectrum planning process for the Milwaukee area, which includes the Green Bay, Wisconsin market. As the licensee of a television station in Green Bay, Aries is vitally concerned about the availability of sufficient ATV spectrum in Green Bay.

12. Under the Freeze Order, applicants seeking a waiver of the freeze must provide "compelling reasons" why the freeze should not be applied to their situation. See Order, RM-5811, Mimeo No. 4074 (released July 17, 1987), para. 2. WVCY's burden to justify a waiver of the freeze is all the more severe in light of the fact that its proposals, by reducing the amount of ATV

spectrum available in the Milwaukee area and altering the development of the ATV Table, would contravene the very purpose of the freeze. See WAIT Radio v. FCC, 459 F.2d 1203, 1208 (D.C. Cir. 1972), cert. denied, 409 U.S. 1027 (1972) (waiver applicant must show that waiver will not undermine policy of the rule from which waiver is sought). As shown above, WVCY's sole justification for waiver -- the alleged inability of WSCO(TV) to operate as a Suring station -- is patently insufficient to satisfy WVCY's burden.

Conclusion

The proposals in the NPRM would undermine both the Commission's allotment policies and the freeze on changes to the TV Table of Allotments within the Milwaukee metropolitan area. WVCY has not shown and cannot show that its situation is one of those rare ones that would merit a waiver of either of these prohibitions. Accordingly, Aries urges the Commission to deny WVCY's proposed amendments to the Table and terminate this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "COMMENTS OF ARIES TELECOMMUNICATIONS CORPORATION" were sent this 1st day of March, 1993, by first class United States mail, postage prepaid, to the following:

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